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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 642

EDWARD H. PHILLIPS and EMMA E. PHILLIPS,
his wife,
PETER F. AMER and MARY AMER,
his wife,
WANDA GOETZ and CHARLES BELL,
Petitioners,

vs.

FRANK A. SAUNDERS and EDITH M. SAUNDERS,
his wife,
Respondents.

ANSWER AND BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

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DONALD G. MURRAY,
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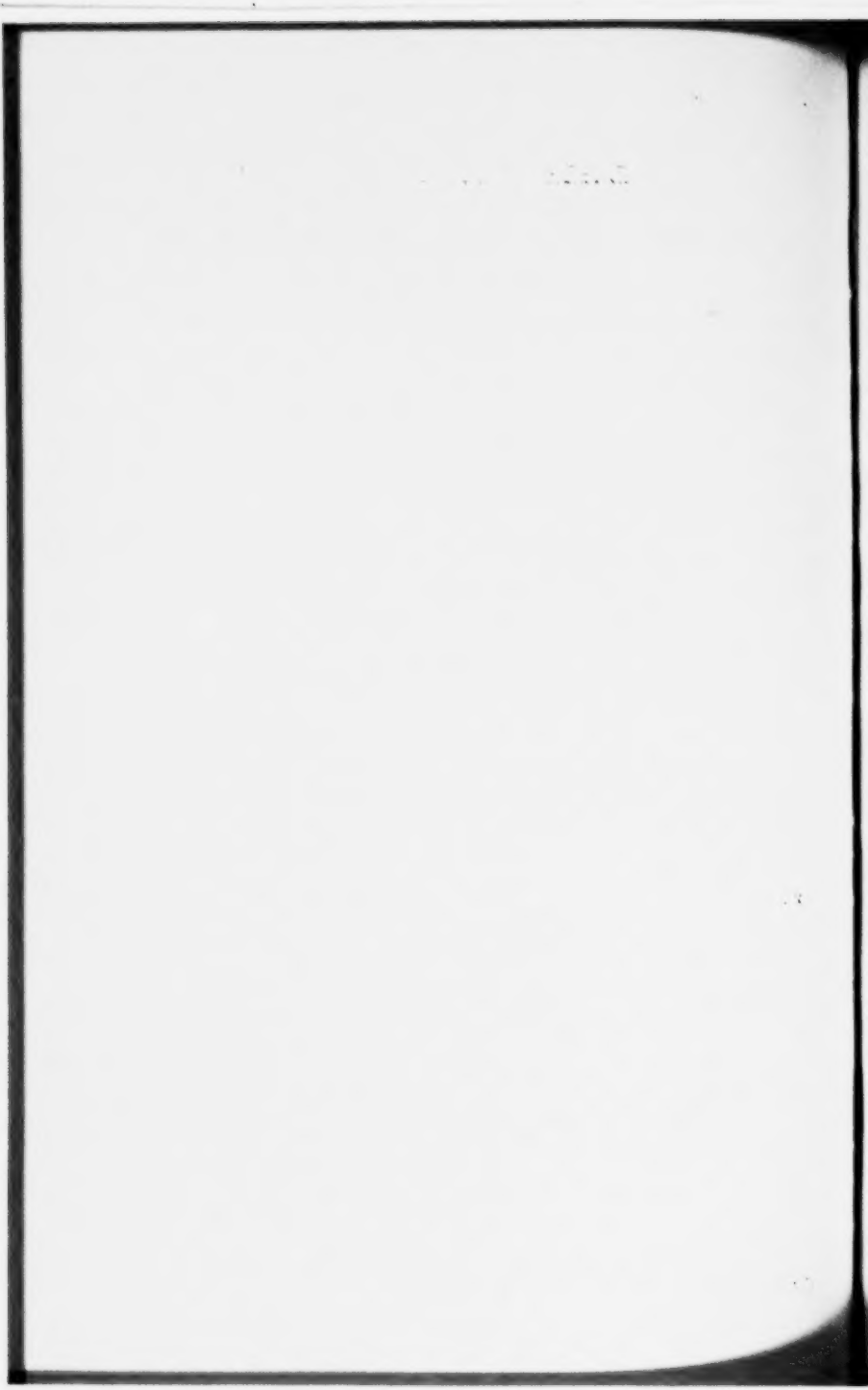
The Daily Record Co., Baltimore 3, Md.



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TO THE HONORABLE, THE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Your Respondents, Frank A. Saunders and Edith M. Saunders, his wife, oppose the petition of Edward H. Phillips and Emma E. Phillips, his wife, Peter F. Amer and Mary Amer, his wife, for a Writ of Certiorari to review the Decree of the Court of Appeals of Maryland, passed and

filed on December 17, 1948, in the suits entitled Frank A. Saunders and Edith M. Saunders, his wife, Hiram E. Smith and Lulu E. Smith, his wife, Appellants vs. Edward H. Phillips and Emma E. Phillips, his wife, Peter F. Amer and Mary Amer, his wife, October Term, 1948, No. 47, upon the following grounds and because of the following reasons:

STATEMENT OF MATTER INVOLVED

There were two cases in the Court of Appeals in Maryland. Both cases arose in the Circuit Court for Anne Arundel County, Maryland, sitting in Equity. The first case filed was No. 9103 Equity, Edward H. Phillips, et al. vs. Frank A. Saunders and appears as No. 47 in the Court of Appeals of Maryland. The second case filed was No. 9161 Equity, Wanda Goetz, et al. vs. Hiram E. Smith, et al., and is No. 46 in the Court of Appeals of Maryland. The Honorable William J. McWilliams, Judge of the Circuit Court for Anne Arundel County, passed a Decree on February 28, 1948, in the first filed case, permanently enjoining the Defendants and all persons claiming under them "from suffering or permitting any person or persons of Negro, Chinese, or Japanese descent to use or occupy" the lots owned by the defendant Negroes except bona fide servants or employees occupying the property in the course of that service or employment (R. 59, 60, 61). On February 27, 1948, the Circuit Court for Anne Arundel County, Maryland, in Equity, passed a Decree in the second case dismissing the Bill of Complaint (R. 38). Appeals to the Court of Appeals of Maryland, the highest Court in the State of Maryland, were taken by the unsuccessful parties in each case. By the Decree of December 17, 1948, the Court of Appeals of Maryland reversed the Decree of February 28, 1948, and dismissed the bill with costs to the Appellants and by the Decree of December 17, 1948, also affirmed the Decree of

February 27, 1948, with costs. The Mandates in both cases were issued by the Court of Appeals of Maryland on December 17, 1948 (R. 84).

QUESTIONS INVOLVED

I.

Whether judicial non-enforcement by the Court of Appeals of Maryland of a restrictive covenant against the use and occupancy of land by Negroes deprives the Petitioners of their liberty and property without due process of law, contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States of America.

II.

Whether the Court of Appeals of Maryland is bound by the decisions of the Supreme Court of the United States in the case of *Shelley v. Kraemer, McGhee v. Sipes,* 334 U. S. 1, 92 L. Ed. 845, *Trustees of the Monroe Avenue Church of Christ, etc., et al. v. Fred C. Perkins, et al., Tom D. Amer v. Superior Court of the State of California,* and *Yin Kim v. Superior Court of the State of California.* (All at 334 U. S. 813 Per curiam memorandum decisions.)

III.

Whether any principle of estoppel operated to prevent the Respondents buying, using or occupying their property in the instant case and defending their right to buy, use or occupy their property in the courts of the state in which their property was located.

The Court of Appeals of Maryland by its decisions in the cases from which the Petitioners are applying to your Honorable Court for a Writ of Certiorari answered Ques-

tion I in the negative, Question II in the affirmative and Question III in the negative. The Respondents respectfully contend that the answers given by the Court of Appeals of Maryland were correct and in full accordance with the views of this Court as set forth in the cases cited in our Question II.

REASONS FOR OPPOSING THE GRANTING OF THE WRIT

The Writ of Certiorari should be denied in this case because:

First: The Court of Appeals of Maryland by its decree in the instant case did nothing which would deprive the Petitioners of their liberty and property without due process of law or contravene Sec. I of the Fourteenth Amendment of the United States of America.

Second: The Court of Appeals of Maryland in applying the rule of *Shelley v. Kraemer* and *McGhee v. Sipes, supra,* simply reiterated and applied and firmly developed legal and constitutional principles.

(a) The right of a citizen to use, occupy and enjoy his property is guaranteed by the Constitution and the laws of the United States of America.

United States Constitution, Article IV, Sec. 2, Fifth Amendment, Fourteenth Amendment, 8 U. S. C. Section 41, 8 U. S. C. Section 42;
Ward v. Maryland, 12 Wall. 418;
The Slaughter House Cases, 16 Wall. 36;
Buchanan v. Warley, 245 U. S. 60.

(b) Action by a state, through its judiciary, prohibiting or impairing, on account of race or color, the right of a per-

son to use, occupy or enjoy his property is violative of the constitutional guarantee of due process.

Ex parte Virginia, 100 U. S. 339;
Virginia v. Rives, 100 U. S. 313;
Chicago, B. & O. R. Co. v. Chicago, 166 U. S. 226;
Richmond v. Chicago Traction Co., 207 U. S. 20;
Mooney v. Holohan, 294 U. S. 103;
American Federation of Labor v. Swing, 312 U. S. 321.

(c) The agreement in its inception was subject to constitutional limitations upon the power of the courts to enforce it.

Norman v. B. & O. R. Co., 294 U. S. 240;
Home Building and Loan Assoc. v. Blaisdell, 290 U. S. 398.

Third: There is no principle of estoppel operative in the instant case which would prevent the respondents from asserting rights guaranted to them by the Constitution and the laws of the United States.

> "* * * Estoppel by conduct is such conduct by the one sought to be estopped as thereafter precludes him from asserting a cause of action or relying on a defense, although such cause of action, or defense may be based on truth, against one who has changed his position for the worse in reliance on such conduct. * * *" 31 C.J.S. 239, 240 Sec. 59.

There can be no logical contention that the Petitioners fall within the protections set forth in the above cited quotation.

In support of the aforegoing grounds for denial of the writ of certiorari, respondents submit herewith the accompanying brief setting forth in detail the pertinent facts and argument applicable thereto.

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Court of Appeals of Maryland be denied.

Respectfully submitted,

CHARLES H. HOUSTON,
DONALD G. MURRAY,
Attorneys for Respondents.

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BRIEF IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

STATEMENT OF THE FACTS

The Petitioners in both of the cases involved in this Petition own residential properties in a development in Anne Arundel County, Maryland, known as "Beachwood Forest". A plat of this development appears on Pages 9 and 10 of the Record. As part of the uniform plan of development, there were a number of restrictive covenants placed upon

the developed land. The particular covenant involved in this litigation is the Sixth Covenant, reading as follows:

> "SIXTH: That neither said lot nor any part thereof shall be sold, leased, transferred to or permitted to be occupied by any negro, Chinaman, Japanese or person of negro, Chinese or Japanese descent; this restriction not to include servants or employees of the owners or occupants of said lot."

The other covenants are concerned with the minimum cost of a residence, the location of outbuildings, prohibitions against keeping of swine, the maintenance of nuisances noxious or dangerous to health, the use or occupation of the lot for manufacturing, brewing, distilling or for the sale of spirituous or malt liquors, and with provisions in regard to the erection of privies and fences. All of the restrictions appear in various deeds (R. 12-13, 71, 72, 74, 76).

It was alleged in the verified Bill of Complaint in the first filed suit that the Petitioners bought their residential properties and erected valuable dwellings and improvements on the lots, relying on the Sixth Covenant against Negro use and occupation (R. 67).

The Trial Court found as a fact, and the finding is supported by the evidence, that the existence of the Six Restriction was known to the Respondents "prior to their purchase of the property" (R. 58; see also R. 77, 78). The Trial Court decided that as to the property involved in the second case filed (No. 46, Court of Appeals of Maryland), the 64.8 acres involved in the second case had been withdrawn from the plan of development and the restrictive covenant did not apply to that land, and hence dismissed the Bill of Complaint in that case. In the case first filed, (No. 47, Court of Appeals of Maryland) the Trial Court found that the lots involved in that litigation were sub-

ject to the restrictive covenant. It found that the Respondents were Negroes and used and occupied their properties not as bona fide servants or in the course of service or employment. The Trial Court passed a Decree enjoining the use and occupancy by the Defendants and those claiming under them (R. 47-59; 59-61).

The Trial Court filed a written Opinion on February 27, 1948, in regard to both cases. This Opinion appears in the Record, pages 47-59.

The unsuccessful parties appealed in both cases. Between the time of the appeals and the decision of the Court of Appeals, the Supreme Court of the United States had decided and filed its Opinion in the cases of *Shelley v. Kraemer* and *McGhee v. Sipes, supra,* i.e., on May 3, 1948 (R. 81).

The Court of Appeals of Maryland affirmed the Decree dismissing the Bill in the second filed case and reversed the Decree issuing the permanent Injunction in the first filed case. The Court of Appeals rejected the Petitioners' position that the case was not controlled by *Shelley v. Kraemer* and *McGhee v. Sipes, supra,* and declined to hold that the Petitioners would be denied due process of law if the enforcement of the restrictive covenant and easement were withheld by the State Courts. The Court of Appeals of Maryland also refused to hold that the Respondents were estopped by their conduct in purchasing and occupying the property with full knowledge of the existence of the valid restrictive covenant and easement, from contending in the State Courts that the State Courts had no right or power to enforce the restrictive covenant and easement. The Court of Appeals was of the opinion that both cases were controlled by *Shelley v. Kraemer* and *McGhee v. Sipes.*

ARGUMENT

I.

THE JUDICIAL NON-ENFORCEMENT BY THE COURT OF APPEALS OF MARYLAND OF A RESTRICTIVE COVENANT AGAINST THE USE AND OCCUPANCY OF LAND BY NEGROES DOES NOT DEPRIVE THE PETITIONERS OF THEIR LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO SECTION 1 OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

The Petitioners contended in the Court of Appeals of Maryland and contend in their petition here that the Court of Appeals of Maryland by its refusal to enforce the restriction against use and occupancy of the land by the defendants below deprived the Petitioners of their liberty and property without due process of law contrary to Section I of the Fourteenth Amendment of the Constitution of the United States of America.

Respondents respectfully submit that this contention is invalid.

The decree of the Court of Appeals of Maryland did not deprive the Petitioners of any right which they had prior to its decision. The decree did not strip the Petitioners of their ownership of the property. The decree did not strip them of their use of the property. The decree did not strip them of their occupancy of the property.

The Petitioners have argued that there is no inequality of treatment meted out to the Respondents because of their race when an injunction is issued against them to enforce such restrictive covenants.

> "There is no possible inequality of the enforcement of the law, as the State Courts give their equitable remedies and relief to all persons who apply regardless of race. The Injunction in this case results from

the breach of the restrictive covenants, not because of the race of the parties as such." (Petitioners' Petition for Certiorari and Brief in Support thereof p. 16.)

But the converse of this proposition was clearly recognized by Your Honorable Court in its opinion filed in the *Shelley v. Kraemer* and *McGhee v. Sipes* cases, *supra*.

There your Honorable Court had before it voluminous and numerous briefs and heard lengthy arguments from all parties. After consideration of this matter in opinion filed, Mr. Chief Justice Vinson speaking for the unanimous court (Mr. Justice Jackson, Mr. Justice Reed, and Mr. Justice Rutledge took no part in the consideration or decision in the cases) said at page 10:

"* * * The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may or who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; 'simply that and nothing more'." And again in the same cases page 22: "* * * The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. Marsh v. Alabama, 326 U. S. 501 (1946)."

II.

THE COURT OF APPEALS OF MARYLAND IS BOUND BY THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN THE CASE OF SHELLEY V. KRAEMER, McGHEE V. SIPES, 334 U. S. 1, 92 L. ED. 845, TRUSTEES OF THE MONROE AVENUE CHURCH OF CHRIST, ETC., ET AL V. FRED C. PERKINS, ET AL., TOM D. AMER V. SUPERIOR COURT OF THE STATE OF CALIFORNIA, AND YIN KIM V. SUPERIOR COURT OF THE STATE OF CALIFORNIA (All at 334 U. S. 813 Per curiam memorandum decisions).

The Petitioners rely upon the argument that the factual matters involved in the *Shelley v. Kraemer* and *McGhee v. Sipes* cases, *supra*, differ so gravely from those in the instant cases that the latter must be distinguished. The Court of Appeals of Maryland answered this question appositely and succinctly. Chief Judge Marbury speaking for the unanimous court stated:

> "* * * We are not at liberty to decide to the contrary, (that restrictive covenants made on the grounds of use and occupancy by an excluded class defined wholly in terms of race or color cannot be enforced in the state courts) or to attempt to whittle away the effect of such decisions by holding that some statements made are dicta. * * *" (Record 82) (parenthesized portion ours.)

The cases are numerous which develops the following points:

(a) The right of a citizen to use, occupy and enjoy his property is guaranteed by the Constitution and the laws of the United States of America.

United States Constitution, Article iv, Sec. 2, Fifth Amendment, Fourteenth Amendment, 8 U. S. C. Section 41, 8 U. S. C. Section 42;
Ward v. Maryland, 12 Wall. 418;
The Slaughter House Cases, 16 Wall. 36;
Buchanan v. Warley, 245 U. S. 60.

(b) Action by a state, through its judiciary, prohibiting or impairing, on account of race or color, the right of a person to use, occupy or enjoy his property is violative of the constitutional guarantee of due process.

Ex parte Virginia, 100 U. S. 339;
Virginia v. Rives, 100 U. S. 313;
Chicago, B. & O. R. Co. v. Chicago, 166 U. S. 226;
Richmond v. Chicago Traction Co., 207 U. S. 20;
Mooney v. Holohan, 294 U. S. 103;
American Federation of Labor v. Swing, 312 U. S. 321.

(c) The agreement in its inception was subject to constitutional limitations upon the power of the courts to enforce it.

Norman v. B. & O. R. Co., 294 U. S. 240;
Home Building and Loan Assoc. v. Blaisdell, 290 U. S. 398.

The argument for differentiating the instant cases from *Shelley v. Kraemer* and *McGhee v. Sipes* cases, *supra*, loses what little strength possessed by it when we consider Your Honorable Court's further rulings. On the same day of the *Shelley v. Kraemer* cases, Your Honorable Court decided the *Hurd et al. v. Hodge et al.*, and the *Urciolo et al. v. Hodge et al.*, 334 U. S. 24, and on a different set of facts adhered to the reasoning of the *Shelley* cases. And one week later Your Honorable Court handed down memorandum decisions in three more cases all adhering to the principles enunciated in the *Shelley v. Kraemer*. See *Trustees et al., Tom D. Amer v. Superior Court of the State of California*, and *Yin Kim v. Superior Court of the State of California*. (All at 334 U. S. 813 Per curiam memorandum decisions.)

In view of all this there is certainly no reason to differentiate or distinguish the instant cases from the *Shelley v.*

Kraemer. These are rights involved not to be set aside lightly or for technical reasons, but "rights so basic to our society, that after the Civil War, their protection against invasion by the States was safeguarded by the Constitution. (See Mr. Justice Frankfurter's concurring opinion in *Hurd et al. v. Hodge et al., supra.*)

III.

NO PRINCIPLE OF ESTOPPEL OPERATED TO PREVENT THE RESPONDENTS BUYING, USING OR OCCUPYING THEIR PROPERTY IN THE INSTANT CASES AND DEFENDING THEIR RIGHT TO BUY, USE OR OCCUPY THEIR PROPERTY IN THE COURTS OF THE STATE IN WHICH THEIR PROPERTY WAS LOCATED.

The mere fact that the Respondents knew that the property which was purchased had restrictive covenants against use and occupancy by Negroes does not estop them from defending their right to use and occupy the same. In simple terms: the Respondents had a basic constitutional right. Your Honorable Court in *Shelley v. Kramer* case held that the grant of judicial enforcement of such restrictive agreements by the courts of the states denies the Respondents the equal protection of the laws under the Constitution of the United States. Petitioners can not now come and argue that because such basic constitutional right had been denied the Respondents by the state courts prior to the decision of Your Honorable Court in the *Shelley v. Kraemer* case the Respondents were forever barred from defending that right in those same state courts.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court deny the issuance of the writ of certiorari to the Petitioners.

Respectfully submitted,

CHARLES H. HOUSTON,
DONALD G. MURRAY,
Attorneys for Respondents.